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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 U-HAUL CO. OF NEVADA, INC., *et al.*,

11 Plaintiffs,

12 v.

13 GREGORY J. KAMER, LTD., *et al.*,

14 Defendants.
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Case No. 2:12-CV-00231-KJD-CWH

ORDER

16 Before the Court is Defendant Debra Wilcher's ("Wilcher") Objection to the Order
17 Concerning Defendant, Debra Wilcher's, Emergency Motion For Protective Order (#228). Plaintiff
18 U-Haul ("U-Haul") responded (#236) and Defendant Wilcher replied (#242). The Order objected to
19 (#217), denies Wilcher's Motion (#75) which was intended to avoid further depositions, including
20 her own.

21 **I. Background**

22 This matter has a long, complex procedural history with which all parties and the Court are
23 familiar. For the sake of brevity, the Court will not restate all of it here. Simply stated, Plaintiffs
24 were represented by Gregory J. Kamer, Ltd. d/b/a Kamer Zucker & Abbott law firm ("KZA" or
25 "Kamer") in unfair labor proceedings before NLRB. After the existence of an affair between
26 NLRB counsel and a KZA paralegal, Debra Wilcher ("Wilcher") came to light, Plaintiffs severed

1 their relationship with KZA and enlisted the services of other law firms in order to reopen the
2 underlying case, which was eventually settled. This subsequent suit is brought against KZA and
3 Wilcher for malpractice related claims.

4 On February 14, 2013, in order to gauge where the parties stood on the pending motions,
5 Magistrate Judge Hoffman conducted an additional hearing and heard argument from the parties. *See*
6 *Mins. of Proceedings* (#173); *Tr. of Proceedings* (#183). The parties were in general agreement that
7 the dispute had not been resolved. The parties agreed that, depending on the decision on the motions,
8 it may be necessary to conduct additional, albeit limited, discovery. Magistrate Judge Hoffman
9 confirmed that, consistent with instruction of Magistrate Judge Johnston, the parties did not conduct
10 any additional depositions after the initial hearing.

11 Much of the hearing before Judge Johnston was spent trying to determine how depositions
12 should be counted, both generally and in this case. During the course of the hearing, Plaintiffs
13 agreed to limit any additional depositions to Defendant Wilcher, attorney Ed Keller, and attorney
14 Scott Abbott. The same representation was made during the hearing before Magistrate Judge
15 Hoffman. *See Tr. of Proceedings* (#182) at 77:17 - 78:6. Plaintiffs further agreed to pay all costs
16 associated with bringing Defendant Wilcher to Las Vegas for the proposed deposition. *Id.* at 78:7-9.
17 Nevertheless, Wilcher remains adamant that the depositions should not go forward.

18 Ultimately, Magistrate Judge Hoffman found that the parties had stipulated to more than ten
19 depositions, but limited the depositions to Defendant Wilcher, attorney Ed Keller, and attorney Scott
20 Abbott.

21 II. Standard of Review

22 A District Judge should modify or set aside a Magistrate Judge's Order if it is clearly
23 erroneous or contrary to law. See Fed. R. Civ. P. 72; LR IB 3-1.

24 III. Analysis

25 Defendant Wilcher asserts that Magistrate Judge Hoffman's Order was clearly erroneous on
26 four grounds. First, that the Order improperly construed the parties' stipulation as to depositions.

1 Second, that no stipulation was entered into. Third, that allowing the depositions fails to adequately
2 tailor discovery to the needs of the case. Fourth, there are pending dispositive motions.

3 A. Construing the Parties' Stipulation

4 Both objections to the stipulation will be dealt with together. First, as noted by the Magistrate
5 Judge, all parties—including Wilcher—signed the discovery stipulation which included twenty-five
6 deponents (#67). To support Wilcher's argument that no stipulation exists, she relies exclusively on a
7 strained application of an unreported case from the Eastern District of California, Truong v.
8 Sacramento County Sheriff Dept., 2012 WL 5707228. Defendant reads this case to hold that the mere
9 failure to object to depositions beyond ten is not a stipulation to allow more than ten depositions. The
10 Court does not disagree. However, this case is not on point. Rather than failing to object, Wilcher
11 signed the stipulation referencing an additional twenty-five depositions to be taken. Accordingly, no
12 clear error is found on this ground.

13 Wilcher further contends that even if a stipulation does exist, Wilcher's name was not on the
14 stipulated list and so she is not subject to being deposed. However, it is at best unclear that an
15 agreement to exceed ten depositions necessarily precludes the substitution of parties to be deposed.
16 Further, Plaintiff points to evidence in the stipulation itself suggesting that Wilcher was
17 unintentionally omitted from the list (the inclusion of her place of residence as a deposition location,
18 despite no other deponents being located in the vicinity). Accordingly, the Court does not find clear
19 error in the Magistrate Judge allowing Wilcher to be deposed.

20 B. Tailoring the Depositions to the Needs of the Case

21 Federal Rule of Civil Procedure 30(a)(2) requires the court's permission (consistent with
22 Rule 26(b)(2)) unless the parties have stipulated to the deposition and it would result in more than
23 ten depositions being taken. The Magistrate Judge found that the parties had so stipulated, and so
24 allowed the deposition, and the Court does not find clear error.

25 However, the same result would be reached even under a full Rule 26(b)(2) analysis. This
26 Rule requires the courts to balance discovery with various concerns. Fed. R. Civ. P. 26(b)(2). At

1 issue here are the principles in sub-iii, which balance the burden and expense of discovery against its
2 benefit, taking into consideration “the needs of the case, the amount in controversy, the parties’
3 resources, the importance of the issues at stake in the action, and the importance of the discovery in
4 resolving the issues.” Id.

5 Here, Wilcher is not only a party, but the sole surviving party to the activities which sparked
6 this entire case. Her testimony is among the most vital in this matter, and her testimony will very
7 likely move this case toward conclusion, either through settlement or at trial. Given the long and
8 embattled history of this case, the cost of three additional depositions is slight, especially relative to
9 their likely impact on the matter. Accordingly, the depositions should go forward under Rule
10 26(b)(2) analysis.

11 C. Pending Dispositive Motions

12 Wilcher argues that allowing discovery to continue prior to a determination as to the
13 dispositive motions is unfairly prejudicial because Wilcher’s arguments are now “out in the open.”
14 However, our judicial system has abandoned the concept of ambush adjudication, preferring instead
15 to reach decisions on the merits of the matter. Erskine v. Consol. Rail Corp., 814 F.2d 266, 272 (6th
16 Cir. 1987). Further, whatever prejudice would be effected by allowing discovery after the filing of
17 dispositive motions is outweighed by the prejudice that would be effected if Wilcher was not
18 permitted to be deposed. Additionally, it is possible and perhaps even likely that some of the new
19 deposition testimony will inform the disposition of various dispositive motions. Lastly, all parties,
20 including Wilcher, agreed before Magistrate Judge Hoffman that additional discovery might be
21 necessary. Wilcher cannot change her tune simply because her own deposition is in the offing.

22 IV. Conclusion

23 This Court finds no clear error in Magistrate Judge Hoffman’s determinations, and has found
24 additional grounds in their support. Further, Defendant Wilcher’s remaining arguments are
25 unpersuasive.

1 Accordingly, **IT IS HEREBY ORDERED** that Defendant's Objection to the Order
2 Concerning Defendant, Debra Wilcher, Emergency Motion for Protective Order (#228) is **DENIED**
3 and Magistrate Judge Hoffman's Order (#217) is **AFFIRMED**.

4 DATED this 15th day of August 2013.

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Kent J. Dawson
United States District Judge
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